

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR  
ENVIRONMENTAL RESPONSIBILITY,  
2000 P Street, NW, Suite 240  
Washington, D.C. 20036

Plaintiff,

V.

Civil Action #

UNITED STATES FISH & WILDLIFE SERVICE  
1894 C Street, NW  
Washington, D.C. 20240

## COMPLAINT

Defendant.

## PRELIMINARY STATEMENT

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the United States Fish & Wildlife Service ("FWS" or "the Agency") to disclose records wrongfully withheld in failing to respond to a FOIA request from Plaintiff within the statutory deadline.
2. FOIA requires that federal agencies respond to public requests for documents, including files maintained electronically, in order to increase public understanding of the workings of government and access to government information.
3. Plaintiff Public Employees for Environmental Responsibility ("PEER") is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of the federal government.
4. Plaintiff's request sought copies of permits authorizing Native American and/or tribal take of protected bird species in the years 2011 and 2012.

5. This request serves to help the public in that it documents the extent of removal of eagles and hawks under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. Additionally, it reveals how FWS protects species within its legal care.
6. Plaintiff's request was dated and submitted to FWS May 9, 2012. In a letter dated May 25, 2012, FWS acknowledged receipt on May 11, 2012, and also stated that Plaintiff's request had been forwarded to the Division of Migratory Bird Management for processing. This letter was signed by Melanie Ikenson, FOIA Coordinator. To date, Plaintiff has not received any documents responsive to this request.
7. FWS's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. FWS's conduct frustrates Plaintiff's efforts to educate the public regarding FWS's efforts to inform and serve the public interest of protecting bird species through their legal bounds. Further, FWS suggests its compliance with FOIA is conditional on tribal approval of the request.
8. Plaintiff has constructively exhausted its administrative remedies under the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(C), and seeks a court order requiring FWS to immediately produce the documents sought in FOIA request as well as other appropriate relief.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
10. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

11. This Court is a proper venue because Plaintiff resides in this district. 28 U.S.C.

§ 1391(e)(1)(C) (where defendant is the government or a government agent, a civil action may be brought in the district where the plaintiff resides if there is no real property at issue).

Venue is also proper under 5 U.S.C. § 552(a)(4)(B).

12. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).

### **PARTIES**

13. Plaintiff PEER is a non-profit public interest organization, with its main office located Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, New Mexico, New Jersey, and Tennessee.

14. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.

15. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media, PEER's web site, [www.peer.org](http://www.peer.org), which draws between 1,000 and 10,000 viewers per day, and PEER's newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.

16. Defendant FWS is an agency of the United States as defined by 5 U.S.C. § 552(f)(1), and is charged with the duty to provide public access to documents in its possession consistent with

the requirements of the FOIA and is denying Plaintiff access to its records in contravention of federal law.

### **FACTS**

17. Plaintiff's request was dated and submitted to the Agency May 9, 2012.
18. Plaintiff's request sought information and records from the FWS pertaining to permits for collecting eagles and hawks by Indian Tribes. More specifically, Plaintiff requested: (1) copies of the permits to the Hopi Tribe, and to other Indian Tribes, to take golden eagles and hawks issued during 2011 and 2012; and (2) Hopi, or other Tribal applications, if any, to the FWS for renewal of the permit for 2011 or 2012, including the collecting reports for 2010 and 2011.
19. Plaintiff received a letter dated May 25, 2012, acknowledging receipt of our request on May 11, 2012. Further, it stated our request had been assigned a tracking number FWS-2012-00821 and was forwarded to the Division of Migratory Bird Management for processing. This letter was signed by Melanie Ikenson, FOIA Coordinator.
20. On August 22, 2012, Plaintiff sent an email inquiry as to the status of the request.
21. An email response was received August 23, 2012, apologizing for the delay. It stated further that after compiling the records responsive to Plaintiff's request, consultation with the affected tribes had been initiated and FWS was awaiting feedback. The email suggested that if any of the affected tribes had an objection to the FOIA request, FWS would not release the documents.
22. Plaintiff responded back the same day, August 23, 2012, stating that while there was no objection to tribal consultations, it was not a valid basis to delay or constructively deny our

FOIA request. Prior to 2012, the records had been routinely annually released to Plaintiff without requiring a FOIA request.

23. To date, Plaintiff has received no additional communications from FWS in regards to the May 9, 2012, FOIA request.

24. To date, Plaintiff has received no documents responsive to the May 9, 2012, FOIA request.

In good faith, Plaintiff has afforded FWS ample time beyond that which is legally required to respond to the request. It has been over five months since the FWS acknowledged Plaintiff's FOIA request.

25. Plaintiff has fully exhausted its administrative remedies for the May 9, 2012, FOIA request.

Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits, as stated by 5 U.S.C. § 552(a)(6)(C). Plaintiff now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

### **CAUSES OF ACTION**

#### **I. Count 1: Violation of the Freedom of Information Act**

26. Plaintiff incorporates the allegations in paragraphs 1 through 25.

27. FWS's failure to disclose the requested documents in the May 9, 2012 request is a violation of FOIA, 5 U.S.C. § 552, and the Agency's own regulations promulgated thereunder.

28. FWS's nonresponse to the May 9, 2012, FOIA request is a constructive denial and wrongful withholding of documents in violation of FOIA, 5 U.S.C. § 552, and the Agency's own regulations promulgated thereunder.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that FWS has wrongfully withheld the requested Agency

- records;
- ii. Issue a permanent injunction directing FWS to disclose to Plaintiff all wrongfully withheld documents;
  - iii. Maintain jurisdiction over this action until FWS is in compliance with FOIA, APA and every order of this Court;
  - iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
  - v. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: October 23, 2012

Respectfully submitted,

/s/  
Kathryn Douglass, DC Bar # 995841  
Public Employees for Environmental Responsibility  
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